LIM YOKE KONG

v.

SIVAPIRAN SABAPATHY

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
HARUN HASHIM SCJ
PEH SWEE CHIN SCJ
[SC CIVIL APPEAL NO. 02-537 OF 1990]
28 AUGUST 1992

TORT: *Road accident - Claim for personal injury - Limitation period for cause of action - Appellant's vehicle insured under third party policy - Respondent unable to ascertain identity of insurers of appellant's motorcycle - Section 80(2)(a) Road Traffic Ordinance 1958 (now s. 96 of the Road Transport Act 1987) - Enforcement of judgment - Insurers identified only after expiry of limitation period - Insurers had refused to confirm that they were at risk - Fraud - Whether concealment amounted to "fraud" - Section 29 Limitation Act 1953 - When time began to run - Distinction between "right of action" and "cause of action" - Sections 6, 29 of Limitation Act 1953.*

WORDS AND PHRASES: *"Fraud" - Section 29 of Limitation Act 1953.*

In this appeal, the facts of the case were as follows:

On 1 April 1977, the respondent (the plaintiff) was lawfully walking along the edge of Jalan Ampang, Kuala Lumpur. He was negligently knocked down by the appellant's motorcycle. The writ was filed on 22 May 1986 i.e. not until the insurers of the motorcycle at the material time was traced and positively identified as East West Insurance Bhd. The insurers were accordingly notified two days earlier on 20 May 1986 for the purpose of s. 80(2)(a) of the Road Traffic Ordinance 1958 (now s. 96 of the Road Transport Act 1987). Under s. 6(1)(a) of the Limitation Act 1953, any action against the rider and owner of the motorcycle based on his negligence would become statute-barred on 31 March 1983.

At the Magistrate's Court, Kuala Lumpur, liability was admitted by the appellant and quantum of damages was also agreed. The only issue was whether the respondent's claim filed on 22 May 1986 was time barred under s. 6(1)(a) of the Limitation Act 1953. The learned Magistrate held that the claim was time-barred as he did not find the motor cyclist or the insurers guilty of any fraud to warrant the intervention of s. 29(b) of the Limitation Act 1953.

On appeal by the respondent (the plaintiff) to the High Court, Eusoff Chin J (as his Lordship then was) reversed the finding of the learned Magistrate. In allowing the plaintiffs appeal, the learned Judge held that on the basis of s. 29(b) of the Limitation Act 1953 the period of limitation should be postponed due to the fraud of East West Insurance Bhd. in withholding itself from being identified, and thereby concealed the right of action from the plaintiff.

Hence, this appeal against the decision of the High Court.

Held:

[1] The learned Judge was justified in reversing the finding of the Magistrate on the issue of fraud, by holding that the period of limitation was postponed to 28 March 1984 when the respondent for the first time discovered the identity of East West Insurance Bhd. and realized

that the insurance company had been hiding itself from discovering for the purpose of avoiding service under s. 80(2)(a) of the Road Traffic Ordinance 1958 and thereby concealed from the plaintiff his right of action.

[2] In the circumstances of this case, the insurance company was clearly guilty of unconscionable conduct amounting to fraud within the meaning of s. 29(b) of the Limitation Act 1953 in concealing from the respondent his right of action, during the period of limitation, and thereby entitling the respondent to a postponement of the limitation period from 1 April 1977 to 28 March 1984.

[3] The fraud of the insurance company could not have been discovered with reasonable diligence before its discovery on 28 March 1984. The fraud based on unconscionable conduct by means of delaying tactics was supported by the evidence, both before and after expiry of the limitation period.

[4] The finding of the learned Judge that the conduct of the insurance company did amount to fraud under s. 29(b) of the Limitation Act 1953 was upheld and the intervention of s.29(b) of the said Act entitled the respondent to postpone the filing of the writ against the appellant.

[5] As the learned Judge was correct in fact and in law in reversing the decision of the Magistrate, judgment should therefore be entered for respondent on the quantum of damages already agreed by the parties with costs.

[Appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

TORT: *Kemalangan jalanraya - Tuntutan kecederaan diri - Tempoh had masa bagi kuasa tindakan - Kenderaan perayu diinsuranskan di bawah polisi pihak ketiga - Responden tidak dapat memastikan identiti penanggung insurans motorsikal perayu - Seksyen 80(2)(a) Ordinan Traffik Jalan 1958 (sekarang s. 96 Akta Pengangkutan Jalan 1987) - Penguatkuasaan penghakiman - Penanggung insurans hanya dikenalpasti selepas tamatnya tempoh had masa - Penanggung insurans enggan mengesahkan tanggungan risikonya - Fraud - Samada penyembunyian membawa kepada "fraud" - Seksyen 29 Akta Had Masa 1953 - Bila masa bermula - Perbezaan diantara "hak tindakan" dan "kausa tindakan" - Seksyen-seksyen 6 dan 29 Akta Had Masa 1953.*

PERKATAAN DAN ISTILAH: *"Fraud" - Seksyen 29 Akta Had Masa 1953.*

Dalam rayuan ini, fakta-fakta kes adalah seperti berikut:

Pada 1 April 1977, responden (plaintif) dengan sahnya sedang berjalan di tepi Jalan Ampang, Kuala Lumpur. Beliau telah dengan tiba-tiba dilanggar oleh motorsikal perayu. Writ telah difailkan pada 22 Mei 1986 iaitu tidak sehingga penanggung insurans motorsikal pada waktu tersebut dikesan dan dengan positif dikenalpasti sebagai East West Insurance Bhd. Penanggung insurans tersebut seterusnya telah diberitahu dua hari lebih awal pada 20 Mei 1986 untuk tujuan s. 80(2)(a) Ordinan Trafik Jalan 1958 (sekarang s. 96 Akta Pengangkutan Jalan 1987). Di bawah s. 6(1)(a) Akta Had Masa 1953, sebarang tindakan terhadap penunggang dan pemilik motorsikal yang berasaskan kepada kecuaiannya akan dihalang oleh statut pada 31 Mac 1983.

Di Mahkamah Majistret, Kuala Lumpur, liabiliti telah diakui oleh perayu dan kuantum kerugian juga telah dipersetujui. Isu yang timbul adalah sama ada tuntutan responden yang difailkan pada 22 Mei 1986 dihalang oleh had masa di bawah s. 6(1)(a) Akta Had Masa 1953. Majistret

yang arif tersebut telah memutuskan bahawa tuntutan tersebut adalah dihalang oleh had masa memandangkan beliau tidak mendapati penunggang motorsikal atau penanggung insurans bersalah atas sebarang fraud hingga memerlukan pencelahan di bawah s. 29(b) Akta Had Masa 1953.

Atas rayuan responden (plaintif) kepada Mahkamah Tinggi, Eusoff Chin (sebagaimana yang arif pada ketika itu) telah menterbalikkan keputusan Majistret yang arif tersebut. Dalam membenarkan rayuan plaintif, Hakim yang arif tersebut telah memutuskan berdasarkan kepada s. 29(b) Akta Had Masa 1953 bahawa tempoh had masa haruslah ditangguhkan akibat fraud East West Insurance Bhd. yang telah mendiamkan diri dari dikenalpasti, dan dengan itu menyembunyikan hak tindakan dari plaintif.

Oleh yang demikian, rayuan ini dibuat terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan:

[1] Hakim yang arif tersebut telah bertindak secara berjustifikasi dalam menterbalikkan keputusan Majistret atas isu fraud, dengan memutuskan bahawa tempoh had masa adalah ditangguhkan hingga 28 Mac 1984 apabila responden buat kali pertama kenal pasti akan identiti East West lnsurance Bhd.dan menyedari bahawa syarikat insurans tersebut mendiamkan diri dari dikesan untuk tujuan mengelakkan penyampaian di bawah s. 80(2)(a) Ordinan Trafik Jalan 1958 dan dengan itu menyembunyikan hak tindakan dari plaintif.

[2] Dalam keadaan sedemikian, syarikat insurans tersebut jelas bersalah atas kelakuan tidak patut yang membawa kepada fraud dalam lingkungan pentafsiran s. 29(b) Akta Had Masa 1953 dalam menyembunyikan dari responden akan hak tindakannya semasa tempoh had masa, dan dengan itu memberi hak kepada responden untuk suatu penangguhan tempoh had masa dari 1 AprIl 1977 kepada 28 Mac 1984.

[3] Fraud syarikat insurans mungkin tidak dapat ditemui dengan usaha yang munasabah sebelum penemuannya pada 23 Mac 1984. Fraud tersebut yang berdasarkan kepada kelakuan tidak berpatutan melalui taktik melambatkan adalah disokong oleh bukti, baik sebelum ataupun selepas tamatnya tempoh had masa.

[4] Keputusan Hakim yang arif tersebut bahawa kelakuan syarikat insurans ada membawa kepada fraud di bawah s. 29(b) Akta Had Masa 1952 telah didokong dan pencelahan s. 29(b) Akta tersebut memberi hak kepada responden untuk menangguhkan pemfailan writ terha dap perayu.

[5] Memandangkan Hakim yang arif tersebut adalah betul dari segi fakta dan juga undang-undang dalam menterbalikkan keputusan Majistret tersebut maka penghakiman haruslah dicatatkan bagi responden ke atas kuantum gantirugi yang telah dipersetujui oleh pihak-pihak berkenaan dengan kos.

[Rayuan ditolak dengan kos.]

Cases referred to:

R.B. Policies At Lloyd's v. Butler [1950] 1 KB 81 ***(refd)***

Kitchen v. The Royal Air Forces Association & Ors. [1958] 2 All ER 241 ***(refd)***

Hock Hua Bank Bhd. v. Leong Yew Chin [1987] CLJ (Rep) 126 ***(dist)***

New Zealand Insurance Co. Ltd. v. Ong Choon Lin (t/a Syarikat Federal Motor Trading) [1992] 1 CLJ (Rep) 230 ***(dist)***

Baroda Spinning & Weaving Co. Ltd. v. Satyanarayan Marine & Fire Insurance Co. Ltd. [1914] AIR Bom. 225 ***(refd)***

Credit Corpn. (M) Sdn. Bhd. v. Fong Tak Sin [1991] 1 CLJ (Rep) 69 ***(dist)***

Johannes Koplan v. Aw Chen [1970] 1 MLJ 220 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 29
Limitation Act 1953, ss. 6(1)(a), (c), 29(a), (b), (c)
Limitations Act 1939 [UK], s. 26
Road Traffic Ordinance 1958, s. 80(1)(b), (2)(a) (Now Road Traffic Act 1987)
Rules of the High Court 1980, O. 20 r. 5

For the appellant - D.C. Alfred; M/s. Sangara & D.C. Alfred
For the respondent - R.K. Nathan (Victoria Martin with him); M/s. R.K. Nathan & Co.

JUDGMENT

Mohd. Azmi SCJ:

This appeal demonstrates the legal and practical difficulties that may be encountered by a victim of a road accident where even with reasonable diligence he could not during the period of limitation ascertain the identity of the insurance company which insures the driver of the vehicle involved under third party policy for the purpose of complying with the seven-days' notice, required to be served on the insurer under s. 80(2)(a) of the Road Traffic Ordinance 1958 (RTO) (now s. 96 of the Road Transport Act 1987) for the purpose of enforcing any judgment obtained against the negligent driver.

Section 80(1) and (2)(a) of the Road Traffic Ordinance 1958 states:

> (1) If, after a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (2) No sum shall be payable by an insurer under the foregoing provisions of this section:-
>
> (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings.

It seems to be suggested by Mr. D.C. Alfred, Counsel for the appellant motor cyclist that even if it is obvious that the tortfeasor is a man of straw, or is unwilling or unable to furnish the identity of the insurer of his vehicle, the injured plaintiff though unable to give the necessary notice under s. 80(2)(a) RTO to make the insurer liable for payment, should nevertheless commence proceedings within the limitation period, or face the consequences of having his action statute barred. To support such a legal proposition, it is necessary to consider relevant provisions of the Limitation Act 1953 in particular s. 6(1)(c) and s. 29(b) read in conjunction with s. 80(1)(b) of RTO 1958.

In this appeal, the facts of the case are by and large not in dispute. The plaintiff was lawfully walking along the edge of Jalan Ampang, Kuala Lumpur on 1 April 1977 when he was negligently knocked down by a motor cyclist (the appellant before us) who was riding a motor cycle bearing Registration Number AF 3571. Under s. 6(1)(a) of the Limitation Act, any action against the motor cyclist based on his negligence would become statute barred on 31 March 1983. Although the plaintiff had given instruction to his present solicitors in

early 1982, no writ was filed until 22 May 1986 that is not until East West Insurance Bhd. was traced and positively identified as the insurer of the motor cycle at the relevant time of the accident, and was accordingly notified two days earlier on 20 May 1986 for the purpose of s. 80(2)(a) RTO.

Before the Magistrate, liability was admitted by the motor cyclist, and quantum of damages had also been agreed. The only issue in the Magistrate's Court was whether the plaintiffs claim filed on 22 May 1986 was time barred under s. 6(1)(a). The Magistrate held that the claim was time barred as he did not find the motor cyclist or the insurer guilty of any fraud to warrant the intervention of s. 29(b). On appeal Eusoff Chin J (as he then was) disagreed. In allowing the plaintiffs appeal, the learned Judge held that on the basis of s. 29(b) of the Limitation Act 1953 the period of limitation should be postponed due to the fraud of East West Insurance Bhd. in withholding itself from being identified, and thereby concealed the right of action from the plaintiff.

In his grounds of judgment the Magistrate held that the identity of the motor cyclist was known to the plaintiff when the plaintiffs solicitors wrote to the motor cyclist on 15 June 1982 which was still within the limitation period, but the plaintiff did not file a claim until 22 May 1986, outside the limitation period. The Magistrate further held that there was no necessity on the part of the plaintiff to have delayed in filing the action notwithstanding that the identity of the insurer could not be determined.

It was his opinion that since the identity of the motor cyclist was known, any further particulars could always be pleaded by way of amendment. He finally quoted the following statement of Streatfield J in *R.B. Policies At Lloyd's v. Butler* [1950] 1 KB 81 on the consequences of lateness and dilatory conduct on the part of a plaintiff in filing his claim:

> I agree with Mr. Atkinson that it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the Courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands.

It is clear from the Magistrate's grounds of judgment that he came to the conclusion that s. 29(b) did not apply in this case because firstly the identity of the motor cyclist was known to the plaintiff in June 1982, well before the expiry of the date of limitation, and secondly on the evidence, neither the motor cyclist nor the East West Insurance Bhd. was guilty of fraud without which s. 29(b) could not apply.

Now, s. 6(1)(a) and s. 29 of the Limitation Act 1953 provide:

Section 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which **the cause of action** accrued, that is to say:-

(a) **actions** founded on a contract or on tort,

(b) **actions** to enforce a recognisance;

(c) **actions** to enforce an award;

(d) **actions** to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

Section 29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) **the action** is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;

or

(b) **the right of action** is concealed by the fraud of any such person as aforesaid; or

(c) **the action** is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

(Emphasis supplied)

In finding that "the right of action is concealed by the fraud" of the motor cyclist or his insurer (East West Insurance Bhd.) as "his agent or any person through whom he claims ..." within the meaning of s. 29(b), the learned Judge agreed with the plaintiff's Counsel submission that there was fraud on the part of East West Insurance Bhd. in concealing the fact that it was the insurer of the motor cycle ridden by the motor cyclist at the time of the accident. In reversing the Magistrate's decision, he based his findings on the following facts as disclosed by the documentary evidence:

On 18 August 1982, the (Motor Insurers' Bureau of West Malaysia) informed the solicitors that they had sent a circular to all insurance companies to ascertain the insurers of motor cycle AF 3571 as on 1 April 1977. The circular was sent out on 16 August 1982 asking the insurance company involved to respond not later than 3 September 1982.

Since there was no response from the insurance company insuring the motor cycle AF 3571, the MIB appointed M/s. Global Insurance to investigate the matter, which in turn assigned M/s. Giam Adjusters to take over the investigations.

On 31 March 1983 the MIB was still unable to ascertain which insurance company was the insurer of motor cycle AF 3571 at the date of the accident. The limitation period of six years under s. 6 of the Limitation Act 1953 expired.

On 17 March 1984 M/s. Global Insurance wrote to MIB, with a copy to the solicitors of the plaintiff, to say that motor cycle AF 3571 was insured with M/s. East West Insurance Bhd., (the insurance company) *vide* Cover Note No. 5182091. The MIB *vide* their letter dated 28 March 1984 to the plaintiff's solicitors confirmed this fact.

The plaintiffs solicitors on 11 April 1984, wrote to the East West Insurance Bhd. asking the insurance company to confirm if they were the insurers for motor cycle AF 3571. After sending reminders, the insurance company, on 13 June 1984 replied that they would seek their solicitors' opinion, but they did not confirm that they were the insurers for the motor cycle AF 3571.

It was only on 20 October 1984 that the insurer's solicitors wrote to the plaintiffs solicitors to the effect that the matter was time barred. There was still no admission that the insurance company was the insurer of motor cycle AF 3571.

After a series of correspondence between solicitors of the plaintiff and the insurance company, on 23 July 1985, the solicitors for the insurance company finally said that the insurance company had refused to take over the conduct of the defence as the claim was time barred.

Thus, both before and after the expiry of limitation period on 31 March 1983, the plaintiff was faced with extraordinary difficulties in identifying East West Insurance Bhd. as the relevant insurer of the motor cycle involved in the accident despite professional assistance from MIB and the insurance investigators. Even after its discovery in March 1984, the company refused to confirm its position as insurer of the vehicle; not until July 1985. What is the cause of this long delay in identifying the insurer? Was it due to inaction or dilatory

conduct on the part of the plaintiff, or was it due to fraud on the part of East West Insurance Bhd. in concealing and withholding its identity for the purpose of avoiding liability under s. 80(2)(a) RTO?

In dealing with the meaning of the word "fraud" in s. 29(b) of the Limitation Act 1953, the learned Judge referred to English decisions for the simple reason that s. 26 of the U.K. Limitation Act 1939 is in *pari materia* with our s. 29. In *Kitchen v. The Royal Air Forces Association & Ors*. [1958] 2 AER 241, the learned Judge quoted the following passage from the judgment of Lord Evershed MR:

> It is now clear, however, that the word 'fraud' in s. 26(b) of the Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S. Ltd.* [1949] 1 AER 465 that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

With respect we agree and adopt the opinion of Lord Evershed MR and having regard to the proviso to s. 80 RTO 1958, in particular s. 80(2)(a), there is clearly a special relationship created by law between the plaintiff here, the motor cyclist and the East West Insurance Bhd. as the insurer whose third party policy covered the motor cyclist. Section 80(2)(a) imposes a statutory liability on the insurance company to satisfy any judgment obtained by the plaintiff against the motor cyclist. The insurance company knew or ought to know that for it to be made liable, it is imperative that the company should be notified by the plaintiff of any Court proceedings against the motor cyclist before or within seven days after the filing of the action. It is therefore unconscionable for the East West Insurance Bhd. having knowledge of the special relationship in concealing itself by the failure to respond within reasonable time to the MIB circular letter dated 16 August 1982 (see p. 63 of Appeal Record). After writing to the motor cyclist on 15 June 1982 and failing to get any response from him, the plaintiffs solicitors took steps to engage the services of MIB to trace the relevant insurer. The MIB, a professional body issued the circular letter to all insurance companies in West Malaysia, well before the expiry of the limitation on 31 March 1983.

In our view the Judge was correct in law in coming to the conclusion that by intentionally refusing to come forward in response to MIB circular letter, the reasonable conclusion to be drawn from such conduct was that the plaintiffs right of action had been concealed by the fraud of the insurance company and as such the six years limitation period which expired on 31 March 1983 should be postponed until the plaintiff had discovered the fraud or could with reasonable diligence have discovered it. Accordingly the learned Judge was justified in reversing the finding of the Magistrate on the issue of fraud, by holding that the period of limitation was postponed to 28 March 1984 when the plaintiff for the first time discovered the identity of East West Insurance Bhd. and realized that the insurance company had been hiding itself from discovery for the purpose of avoiding service under s. 80(2)(a) and thereby concealed from the plaintiff his right of action. By limiting the meaning of "fraud" under s. 29(b) to common law fraud or deceit, the Magistrate would appear to have fallen into serious error in his conclusion.

Before us, Counsel for the appellant motor cyclist did not dispute the fact that the insurance company did not respond to MIB circular letter dated 16 August 1982 until 28 March 1984, but he gave an excuse for the delay on the ground that the insurance company was short of staff and the policy on the motor cycle AF 3571 had expired on 15 November 1983 and

therefore it was difficult to trace the policy. In our view that is no excuse for the unconscionable conduct. It is obviously for the insurance company itself to organise its insurance business in such a way as to be able to discharge its statutory and contractual obligations. One of its statutory obligations is imposed by s. 80 RTO which renders it liable under third party policy to satisfy any judgment obtained by the victim of a road accident against a negligent driver covered by its policy. In our view, there was sufficient evidence before the Court to conclude that the insurance company was guilty of fraud within the meaning of s. 29(b).

We are not persuaded that the trial Judge finding could be displaced merely by putting the blame on the insurer's own administrative deficiency in tracing old records. In any event, the MIB circular letter to all insurance companies dated 16 August 1982 contained clear and sufficient particulars to enable any insurance company to determine whether its policy covered the motor cycle AF 3571 in April 1977, even if the policy had now expired. On balance, it is our view that it should take only a few weeks for an insurance company to trace such basic particulars, having regard to its liability under the Road Traffic Ordinance. As it stood, the MIB had to appoint M/s. Global Insurance and M/s. Giam Adjusters, to carry out investigations before the insurer could be traced. The extraordinary difficulty in discovering the insurance company within time is matched only by its unwillingness to come forward till after the limitation period.

Another argument put forward before us, was that the proper way was for the plaintiff to give the requisite notice under s. 80(2)(a) by newspaper advertisement. However, we fail to appreciate in what way such a course is more superior and desirable than resorting to assistance from MIB who is more conversant and knowledgeable with the working of insurance companies? We are inclined to think (without finally deciding on the matter) that the notice required by s. 80(2)(a) is actual notice and not notice by substituted service, for such a service by newspaper advertisement would be useless unless the relevant insurance company has been identified by name for the purpose of execution of the judgment obtained against the tortfeasor.

The next issue to be considered is the distinction between "cause of action" and "right of action" within the context of s. 29(b) Limitation Act 1953. The learned Judge has obviously disagreed with the conclusion of the Magistrate that the inability of the plaintiff to identify the insurer was no excuse for not filing the claim against the motor cyclist within time. His Lordship held at p. 14 of his written judgment that although the road accident which gave rise to the cause of action on negligence occurred on 1 April 1977, the right of action to damages had been concealed by the fraud of East West Insurance Bhd.. The learned Judge concluded at p. 15 thus:

> I find that the plaintiff could only enforce his right of action against the defendant on 28 March 1984 when the plaintiff was first told by the MIB the name of the insurance company which had insured the defendants motor cycle. I have stressed earlier, that by virtue of s. 80 Road Traffic Ordinance, it would be an exercise in futility for the plaintiff to proceed against the defendant unless he has first given notice to the insurance company under this section. I therefore hold that the period of limitation did not begin to run against the plaintiff until 28 March 1984 when the plaintiff first had knowledge of the name of the insurance company.

It is the contention of Counsel for the appellant that the Supreme Court had ruled that there was no distinction between 'cause of action' and 'right of action'. Counsel cited firstly the case of *Hock Hua Bank Bhd. v. Leong Yew Chin* [1987] CLJ (Rep) 126 where Abdul Hamid

AG LP (as he then was) had this to say when dismissing by majority an appeal against the decision of the High Court which had allowed the plaintiffs application under O. 20 r. 5 RHC 1980 to amend pleading after expiry of period of limitation:

> The rule is silent: indeed, it does not make the granting of leave to amend under r. 5 conditional upon there being no new or substantially new relief arising out of the new cause of action. To construe otherwise would, in my view, be reading into r. 5 something which is not provided for. I am firmly of the view that a new relief is not a relevant consideration. In this regard it may be pertinent to refer to the definition of the words "cause of action" expressed by Lord Justice Diplock in *Letang v. Cooper* [1965] 1 QB 232 as a 'factual situation the existence of which entitled one person to obtain from the Court a remedy against another.' The definition in my view fortifies the point I am making in that a relief or a remedy is ancillary to and not separable from a cause of action. The word "relief" in para. (5) of r. 5 is clearly intended to refer or apply to the original cause of action. It is merely a description with reference only to the original cause of action and should not be construed with reference to the new relief. It is clear beyond argument that it should not have the effect of restricting the Court's power to grant leave to amend in cases where para. (5) of r. 5 is applicable.

The other authority cited was *New Zealand Insurance Co. Ltd. v. Ong Choon Lin* (*t/a Syarikat Federal Motor Trading*) [1992] 1 CLJ (Rep) 230. In delivering the judgment of this Court Vohrah J stated at p. 239; after quoting with approval the passage cited earlier from *Hock Hua Bank's* case:

> It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy.

We are of the view that both authorities do not deal with the meaning of the words "right of action" in s. 29(b) as distinguished from the term "action" or "cause of action" in s. 6(1)(a) and s. 29(a) and (c) of the Limitation Act 1953, with which we are here concerned. It is clear here that the respondents "cause of action" against the appellant is based on negligence, and his "right of action" is in damages against the insurance company by virtue of s. 80 Road Traffic Ordinance. As also stated earlier the limitation period under s. 6(1) is six years from the date of cause of action (1 April 1977), but by virtue of s. 29(b) the period is postponed if the right of action in damages can be shown to have been concealed by the fraud of the tortfeasor or the insurance company.

In our view, by employing different terms in s. 29(b), and in s. 29(a) and (c), the Legislature clearly intends to make a distinction between the terms "cause of action" and the "right of action". In our opinion, *Hock Hua Bank* merely ruled that for purpose of O. 20 r. 5 RHC 1980, an application to amend pleadings cannot be defeated by showing that by such additional cause of action a new relief is sought outside the limitation period, subject to the important proviso that the additional cause of action arose out of the same or substantially the same facts as the original cause of action in respect of which relief had already been claimed. The basic principle behind O. 20 r. 5 is "whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded". Subject to this very important proviso, the fact that a new relief arises out of the amendment is not necessarily fatal. Thus, this is a far cry from saying that the Supreme Court has ruled that there is no distinction between "cause of action" and "right of action" in all cases.

Similarly, the statement of Vohrah J in *New Zealand Insurance Co.'s* case relied upon by the Counsel for the appellant is taken from that part of the judgment where His Lordship was dealing with the validity of a restrictive Clause 19 of a fire insurance policy which had

imposed a limitation of twelve months from the happening of the loss or damage within which the insurance company could be made liable. In upholding the trial Judge's decision, this Court agreed that the condition imposed that the action be commenced within a twelve-month period from the occurrence of the loss or damage was void by virtue of the imperative words of s. 29 of the Contracts Act 1950 as it clearly limited the time within which the respondents could enforce his right under s. 6(1)(a) of the Limitation Act 1953. His Lordship rejected the argument that there was a distinction between a void restrictive condition of limiting the time within which a party to a contract within which he had to enforce his right, and a permissible condition of limiting the time within which he was to have any right - a distinction apparently accepted by many Indian Judges including Butler J in *Baroda Spinning & Weaving Co. Ltd. v. Satyanarayan Marine & Fire Insurance Co. Ltd.* [1914] AIR Bom. 225. Thus, at p. 238 of his judgment, Vohrah J concluded:

> This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this Court in *Hock Hua Bank Bhd v. Leong Yew Chin.*

We are of the opinion that by thus rejecting the existence of a distinction between a right and its enforcement, it cannot be extended to me that the Supreme Court has also considered and rejected the important distinction between "right of action" and "cause of action" in paras. (a) & (b) of s. 29 of the Limitation Act.

In our view, both the authorities cited do not assist the appellant in the argument that the Legislature does not intend to make a distinction between the terms "cause of action" and "right of action" in the two provisions read with s. 6(1)(a). As alluded to earlier, Parliament has expressly enacted the term "right of action" in s. 29(b) as distinguished from "action" or "cause of action" in paras. (a) and (c) of that section. Applying the rule of construction on the ordinary meaning of the words used in Statutes and the fact that the Legislature has employed different terms for different paragraphs in s. 29, we are of the view that Parliament must have intended to have a distinction between the different terms employed, in that postponement of limitation period is allowed under (a) where the action, that is "cause of action" is based on fraud, and whereas under para. (b) it is allowed in all cases where the remedy or right of action is concealed by fraud. The respondents cause of action in this case is based on negligence and not fraud, and as such, s. 29(a) does not apply. On the contrary, it is the case of the respondent that its remedy in damages by virtue of s. 80 RTO was concealed by the fraud of the defendant or the insurance company, and therefore falls under s. 29(b).

In this connection, we have also considered the judgment of this Court in *Credit Corpn. (M) Sdn. Bhd. v. Fong Tak Sin* [1991] 1 CLJ (Rep) 69 and found that it did not take the appellants argument any further, as the Court there was dealing with a case under s. 29(c) which was entirely different from s. 29(b) of the Limitation Act.

We agree with Mr. R.K. Nathan, Counsel for the respondent on the application of the principle of *ubi jus, ibi remedium* that is where there is a right of action there is a remedy. The principle was in fact upheld in the *New Zealand Insurance's* case, where it was held at p. 195 that there was no legal distinction "between a right and its remedy".

In considering this appeal, we are guided by the principle laid down in *Johannes Koplan v. Aw Chen* [1970] 1 MLJ 220, where Ong CJ in delivering the judgment of the Federal Court had this to say at p. 221:

> In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in Court should not be allowed to prevail so as to frustrate any just claim. Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers "have to fight the action without their most essential witness, that would be their misfortune, and not the plaintiffs fault": so said Sir Wilfred Greene MR in *Murfin v. Ashbridge* [1941] 1 AER 231, 232.

In this appeal, we are not persuaded that the learned Judge had erred in law or in fact in concluding that the East and West Insurance Bhd. had deliberately withheld knowledge of itself from the plaintiff by not responding to the MIB circulars, although it had received the circular more than four months before the expiry of the limitation period the explanation given for the unreasonable long delay is unsustainable. In the circumstances of this case, the insurance company was clearly guilty of unconscionable conduct amounting to fraud within the meaning of s. 29(b) of the Limitation Act 1953, in concealing from the plaintiff his right of action, during the period of limitation, and thereby entitling the plaintiff to a postponement of the limitation period from 1 April 1977 to 28 March 1984, when for the first time he came to know of the identity of the insurance company, after all reasonable attempts had been made to trace and identify the insurance company for the purpose of serving the statutory notice under s. 80(2)(a) RTO 1958.

In our view the fraud of the insurance company could not have been discovered with reasonable diligence before its discovery on 28 March 1984. The fraud based on unconscionable conduct by means of delaying tactics is supported by the evidence, both before and after expiry of the limitation period. In our view the learned Judge was correct in holding that during the six years limitation period, the plaintiff had taken all reasonable steps without success to trace the insurer not only from the appellant motor cyclist but also from the police, the RIMV and finally he had to resort to professional assistance from the MIB. It is therefore difficult not to agree with the finding of the learned Judge that the conduct of the insurer did amount to fraud under s. 29(b). In our opinion, the intervention of s. 29(b) entitles the plaintiff to postpone the filing of the writ against the appellant.

The two reasons given by the Magistrate for holding that s. 29(b) did not apply were therefore wrong in law. The Magistrate had failed to consider sufficiently the object and effect of s. 29(b) and erred in law in holding that the respondents was statute barred. The learned Judge was correct in fact and in law in reversing the Magistrate's decision. Judgment should therefore be entered for the plaintiff on the quantum of damages already agreed by the parties.

The appeal was accordingly dismissed with costs.

Also found at [1992] 4 CLJ 2219